Supreme Court, U.S.
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No. 96-113

In The

Supreme Court of the United States

October Term, 1995

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

R. Lawrence Ward
Russell S. Jones, Jr.*
William E. Quirk
of
Shughart Thomson & Kilroy, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, MO 64105
(816) 421-3355
(816) 374-0509 (Facsimile)

**Counsel of Record*

Counsel for Respondent Blackwell Sanders Matheny Weary & Lombardi, L.C.

Dated: September 20, 1996

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OR CALL COLLECT (402) 342-2831

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Respondent respectfully suggests that the issues framed by petitioner are more accurately stated as follows:

1. Whether a federal district court may use 28 U.S.C. § 1446(d), which provides that a state court "shall proceed no further" once a case is removed, to enjoin parties from filing threatened state court cases that are admittedly designed to relitigate issues that the federal court has already decided?

2. Whether the trial court abused its discretion by exercising 28 U.S.C. § 1367 supplemental jurisdiction over state-law claims when the court considered and discussed abstention principles but determined that abstention would be inappropriate?

PARTIES TO THE PROCEEDING

The named respondents to this case are: Reimer & Koger Associates, Inc., Ronald Reimer, Kenneth H. Koger, Clifford W. Shinski, Brent Messick, Robert Crew, Sherman Dreiseszun, Leland Gerhart, I.I. Ozar, Raymond Gifford, Harry S. Jonas, Randall M. Nay, Frank Sebree, Tony Salazar, Philip Pistilli, Michael K. Russell, Gage & Tucker, Peat, Marwick, Mitchell & Co., KPMG Peat Marwick, Robert Spence, Thomas S. Morgan, co-executor of the estate of Frank S. Morgan, Marilyn J, co-executor of the estate of Frank S. Morgan, Isabel A. Kiene, executrix of the estate of Ralph Kiene, Shook, Hardy & Bacon, C. Patrick McLarney, substituted for Shook Hardy law firm, Blackwell Sanders Matheny Weary & Lombardi, L.C.

RULE 29.1 STATEMENT

Respondent Blackwell Sanders Matheny Weary & Lombardi, L.C. is a Kansas City, Missouri-based law firm, with other offices outside of Missouri, operating as a limited liability company under the laws of the State of Missouri. Its member attorneys possess complete ownership of the firm, and the firm possesses no other ownership interests.

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STATEMENT OF THE CASE

Respondent Blackwell Sanders Matheny Weary & Lombardi, L.C. ("Blackwell Sanders") incorporates by reference the factual statements in the opinion of the Eighth Circuit Court of Appeals. Pet. App. A at 1a-14a. Respondent also provides the following additional facts necessary to a full understanding of the petition:

Although KPERS now asks the Court to review the lower court's exercise of supplemental jurisdiction, KPERS did not challenge the assertion of that jurisdiction earlier when it had the opportunity. As the Eighth Circuit noted, KPERS initially appealed the district court's refusal to remand the action to state court after the RTC removed it. Pet. App. A at 3a. The Eighth Circuit held that the removal was proper. *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Associates, Inc.*, 4 F. 3d 614 (8th Cir. 1993) (KPERS I), *cert. denied*, 114 S. Ct. 2132 (1994). Later, the third-party claims against the RTC were dismissed (although the RTC remained in the case as an intervenor). Pet. App. A at 3a. KPERS asked the district court to remand the action to state court, but the district court refused. *Id.* KPERS did not appeal that ruling or the district court's subsequent refusal to reconsider the remand issue. Only after the Eighth Circuit held in *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Associates, Inc.*, 61 F. 3d 608 (8th Cir. 1995) (KPERS III), *cert. denied*, 133 L.Ed.2d 845 (1996), that KPERS was subject to a shorter, two-year statute of limitations, did KPERS again challenge the district court's jurisdiction.

With respect to petitioner's argument that the district court erred by enjoining pending state court proceedings,

there were no state court proceedings pending against respondent Blackwell Sanders at the time the preliminary injunction was issued. The state court action filed by KPERS against Blackwell Sanders had already been removed to federal court and KPERS had not filed any other state court actions against Blackwell Sanders. Pet. App. A at 4a. The district court enjoined KPERS from filing further claims against Blackwell Sanders in any other court "arising out of KPERS's investments in Home Savings Association." Pet. App. A at 34a.

REASONS FOR DENYING WRIT

There are two threshold grounds for denying the writ. First, the Court need not even reach petitioner's issue on whether the trial court properly exercised supplemental jurisdiction because there was an independent basis for federal jurisdiction below, a basis that petitioner does not now challenge. Second, deciding whether a federal district court abused its discretion in exercising supplemental jurisdiction in a fact-specific case is not an issue that warrants the Court's attention.[1] Petitioner's third issue – whether the district court should have enjoined the petitioner from relitigating already-decided issues in state court – is unremarkable. There is no conflict in the Circuits on this point.

[1] Petitioner's second issue is, by petitioner's own admission (Pet. at 13-14), wholly dependent on whether the Court grants certiorari on the first issue petitioner raises.

Because the questions presented by petitioner are not dispositive of the case below, because this case presents no significant conflict among the Circuits, and because review of an abuse of discretion case is not sufficiently important to merit the Court's consideration, the petition should be denied.

I. The Federal District Court Properly Exercised Subject Matter Jurisdiction Over This Case, Both On The Ground Now Challenged By Petitioner, And On An Independent Ground On Which Petitioner Does Not Seek Review

The federal district court in this case initially acquired jurisdiction under the Financial Institution Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1441a(*l*) ("FIRREA"), in which "Congress gave the RTC a broad right to remove any action." *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614, 619 (8th Cir. 1993) (KPERS I), *cert. denied*, 144 S. Ct. 2132 (1994). As the Eighth Circuit stated, "[w]hen the Home Savings directors brought the RTC into the action as a third-party defendant, the RTC had the right to remove 'the entire case' to federal court." *Id.* at 618 (quoting *California v. Keating*, 986 F.2d 346, 348-49 (9th Cir. 1993)). It is uncontested that this removal was proper initially.

Once the trial court obtained jurisdiction over this case, it obtained jurisdiction over the *entire action* under the FIRREA removal provision, 12 U.S.C. § 1441a(*l*)(1), which provides that the "civil action" to which the RTC is a party is "deemed to arise under the laws of the United States" and is "within the original jurisdiction of the

district court." Pet. App. A at 6a; *Spring Garden Assocs. v. RTC*, 26 F.3d 412, 417 (3d Cir. 1994). Because the district court possessed both arising-under and supplemental jurisdiction, and because petitioner now challenges only supplemental jurisdiction, this case can be affirmed on an independent ground not challenged by petitioner. It is thus a poor candidate for certiorari.

Even if the Court were to reach the supplemental jurisdiction question, petitioner does not raise any question worthy of review. A district court's decision to retain jurisdiction under section 1367(c) is reviewable under the abuse of discretion standard. *USF&G Co. v. Murphy Oil USA*, 21 F.3d 259, 263 (8th Cir. 1994) (holding that the trial court rulings on supplemental jurisdiction and abstention will be reversed "only if we determine, giving the district court the deference it is due, the district court abused its considerable discretion"). As the Eighth Circuit stated in *Bushman v. Seiler*, 755 F.2d 653 (8th Cir. 1985):

> A federal court has the power . . . to retain jurisdiction where the party giving rise to federal jurisdiction has been dismissed. . . . When removal jurisdiction is premised on a federal defendant who is subsequently dismissed, the decision to remand the remaining claims is committed to the district court's discretion.

Id. at 654.

Here there are at least three reasons why the trial court did not abuse its discretion in deciding to exercise supplemental jurisdiction. First, the RTC was only dismissed as a third-party defendant; it remains as a limited intervenor in this case. Thus, if the case were remanded, the RTC could once again seek removal if it believed its

rights as receiver for Home Savings were at risk. Second, the trial court had already devoted substantial time to this case, and feared a state court would have difficulty becoming as knowledgeable.[2] Judicial economy thus disfavored remand. Third, the trial court believed the parties would receive a fairer hearing in federal court. Besides the fact that all Kansas state judges participate in petitioner KPERS's retirement plan, the trial court was specifically concerned that a Kansas trial court judge had tried to prevent removal by severing the third-party claims against the RTC in an *ex parte* hearing. Pet. App. at 2a. Therefore, all three of the factors considered in determining whether to remand (convenience, judicial economy, and fairness) favored keeping the case in federal court. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Petitioner claims that the Eighth Circuit's opinion conflicts with opinions of the Seventh and District of Columbia Circuits on the issue of whether the exercise of supplemental jurisdiction is a jurisdictional question. Before the Court could reach this alleged conflict, however, it would first have to find that the district court did not have arising-under jurisdiction under 12 U.S.C. § 1441a(*l*), and then would have to find that the trial court abused its discretion in exercising supplemental jurisdiction. Absent these two preliminary findings, any alleged conflict between the Circuits would not affect the outcome of this case.

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[2] The trial court noted (Pltf. App. 762) that "I have spent more time on this case already than I have spent on any other case but one in the last ten years."

There is in any event no significant conflict among the Circuits that requires the Court's attention. Petitioner seizes on a footnote in the Eighth Circuit's opinion questioning whether the decision "to retain a case after dismissing federal claims is jurisdictional." Pet. App. at 7a n.3. Once again, however, this statement was not necessary to the Eighth Circuit's holding because there was an independent basis – arising-under jurisdiction – for jurisdiction in the trial court. In any event, the Eighth Circuit has correctly read the Court's decisions in *Gibbs*, 383 U.S. 715, and *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 349 (1988). There is no dispute here that federal jurisdiction was present at the time of removal. The trial court's decision to exercise supplemental jurisdiction after dismissal of the RTC is plainly a discretionary matter under *Gibbs* and *Cohill*. As the Court expressly noted in *Cohill*, "*Gibbs* drew a distinction between the power of a federal court to hear state-law claims and the discretionary exercise of that power." 484 U.S. at 349. This case concerns only the latter, discretionary exercise of jurisdictional power.

This case is a poor choice for certiorari because the conflict petitioner alleges was unnecessary to the outcome below. This case concerns discretion under *Cohill* and *Gibbs*. Despite petitioner's assertions, the lower courts do not need guidance in this area.

II. The Court Should Not Issue An Advisory Opinion On How To Apply Principles Of Abstention And Comity To The Particular Facts Of This Case

Petitioner's second question seeks the Court's advice on how principles of abstention and comity should be applied to the particular facts of this case should the Court grant certiorari and remand for further proceedings. But as petitioner itself admits (Pet. at 13-14), this issue becomes important, if at all, only if the Court grants certiorari on petitioner's first question.

Petitioner relies extensively on this Court's decision in *Younger v. Harris*, 401 U.S. 37 (1971), to support its argument that the trial court should have abstained from hearing the merits of this case, and remanded it to Kansas state courts. The *Younger* abstention doctrine, however, is inapplicable where a federal district court has exclusive jurisdiction over a claim. *International Assoc. of Entrepreneurs of America v. Angoff*, 58 F.3d 1266, 1271 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 774 (1996); *Levy v. Lewis*, 635 F.2d 960, 967 (2d Cir. 1980). "The doctrine of abstention is premised on the idea that a federal court may defer to a state court confronted with a similar controversy: there is no need for abstention unless the state and federal courts have concurrent jurisdiction of an issue or case." *Angoff*, 58 F.3d at 1271. Only where there is a *pending* state court proceeding involving state interests "so important that exercise of the federal judicial power would disregard the comity between the States and the National Government" is the *Younger* doctrine applicable. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987). There is no pending state court proceeding against respondent Blackwell Sanders involving these issues. Accordingly, *Younger* does not apply. *See,*

e.g., In re Burns & Wilcox Ltd., 54 F.3d 475, 478 (8th Cir. 1995). Moreover, petitioner has not alleged any significant state interest sufficient to outweigh the benefit of judicial economy gained by finally resolving this dispute in federal court.

Petitioner also claims that comity supports a remand, suggesting that the district court must address state law issues that have not arisen in Kansas courts. Although petitioner contends that complex issues of state law will arise (without convincingly explaining what they might be), there is nothing to prevent the trial court from resolving them. The claims made by petitioner are not novel, but instead involve familiar legal principles. The trial court need only apply Kansas law, not interpret it, a task it can perform as well as a Kansas court.

The statute of limitations issue that KPERS seeks to overturn has been briefed and argued on two levels of the federal judicial system. A remand now would threaten the authority of the federal courts' orders and judgments and thus, if anything, would run counter to federal-state comity. *Cf. In re Agent Orange Product Liability Litig.*, 996 F.2d 1425, 1432 (2d Cir. 1993) (abstention in deference to state courts is inappropriate where to do so "would threaten the authority of the federal judicial system and potentially nullify the federal court's orders and judgment"), *cert. denied*, 510 U.S. 1140 (1994).

III. Petitioner's Alleged Conflict Between The Circuits Is Nonexistent

Petitioner's last ground for granting certiorari is to resolve an allegedly "clear circuit conflict concerning the

proper scope of injunctions" under 28 U.S.C. § 1446(d). But far from presenting a conflict, the decisions of the Fifth and Ninth Circuits were cited by the Eighth Circuit in *support* of its position below. These three Circuits all agree that the scope of § 1446(d) is not limited to enjoining further prosecution of the specific case that was removed.

Under the general removal statute, once an action is removed, the state court loses jurisdiction and "shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d). This statute gives the federal district court explicit authorization to enjoin parties from prosecuting the removed case in state court. The statute has also been interpreted to expressly authorize enjoining substantially similar state cases other than the removed case itself. Where, as here, a party threatens to circumvent the federal court's removal jurisdiction by filing a new state court lawsuit that is substantially the same as the removed action, the federal court may protect its jurisdiction by enjoining the filing or prosecution of the second suit. *Brown v. Seaboard Coast L.R.R.*, 309 F. Supp. 48, 49 (N.D. Ga. 1969); *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 901 (5th Cir. 1975) ("where a district court finds that a second suit filed in state court is an attempt to subvert the purposes of the removal statute, it is justified and authorized by [§ 1446(d)] in enjoining the proceedings in the state court"); *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988); *Myers v. Hertz Penske Truck Leasing, Inc.*, 572 F. Supp. 500, 501-03 (N.D. Ga. 1983) (characterizing what KPERS has done here as a "forum shopping maneuver").

The district court below made a specific finding that petitioner was attempting to subvert federal removal jurisdiction. Pet. App. A at 11a. Petitioner's own counsel admitted as much. *Id.* This action was properly removed to federal court, and petitioner's repeated efforts to obtain a remand failed. Petitioner cannot be allowed to file new state court suits arising out of its Home Savings investments without defeating the very removal that both the Eighth Circuit and the federal district court consistently found was valid. *See Myers*, 572 F. Supp. at 503 (where later-filed state case was "nothing more than a restatement of a properly removed case," federal court required to enjoin it). Petitioner's third question thus presents nothing of substance.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

R. LAWRENCE WARD
RUSSELL S. JONES, JR*
WILLIAM E. QUIRK
of
SHUGHART THOMSON &
KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, MO 64105
(816) 421-3355
(816) 374-0509 (Facsimile)

**Counsel of Record*

Counsel for Respondent
Blackwell Sanders Matheny Weary
& Lombardi, L.C.

Dated: September 20, 1996